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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 arrivia Incorporated, et al.,

10 Plaintiffs,

11 v.

12 John Rowley, et al.,

13 Defendants.  
14

No. CV-23-01039-PHX-DLR

**ORDER**

15  
16 Plaintiffs arrivia, Inc. (“arrivia”) and Panda Holdco LLC (“Panda”) are suing  
17 Defendants John Rowley, Marcia Rowley, and Open Network Exchange, Inc. (“ONE”) for  
18 (1) violation of the Defend Trade Secrets Act (“DTSA”), 18 U.S.C. § 1836 et seq.,  
19 (2) violation of the Arizona Uniform Trade Secrets Act (“AUTSA”), A.R.S. § 44-401 et  
20 seq., and (3) unjust enrichment. (Doc. 8.) Plaintiffs are also suing the Rowleys for two  
21 claims of breach of contract. Pending before the Court are two motions: Defendants’  
22 motion to dismiss Plaintiffs’ complaint pursuant to Federal Rules of Civil Procedure  
23 12(b)(6) and 12(b)(3), which is fully briefed (Docs. 24, 29, 35), and Defendants’ motion  
24 for Rule 11 sanctions, also fully briefed (Docs. 30, 34, 36).<sup>1</sup>

25 For the reasons set forth below, the Court (1) grants Defendants’ Rule 12(b)(6)  
26 motion to dismiss Plaintiffs’ DTSA, AUTSA, and unjust enrichment claims; (2) construes

27  
28 <sup>1</sup> Oral argument is denied for both motions because the issues are adequately briefed, and oral argument will not assist the Court in reaching its decision. *See* Fed. R. Civ. P. 78(b); LRCiv. 7.2(f).

Defendants’ Rule 12(b)(3) motion as a *forum non conveniens* motion and grants the motion to dismiss the remainder of Plaintiffs’ complaint (Doc. 8) without prejudice; (3) denies Defendants’ motion for sanctions; and (4) denies without prejudice the parties’ respective requests for reasonable attorneys’ fees and costs.

## **I. BACKGROUND<sup>2</sup>**

### **A. The Delaware Lawsuit**

The Rowleys are the former majority owners and executives of arrivia, a travel-loyalty provider specializing in the distribution and servicing of travel and leisure products. (Doc. 8 ¶¶ 1, 28.) In 2018, the Rowleys sold arrivia to Panda and entered into a Restrictive Covenant Agreement containing non-compete, non-solicitation, and confidentiality obligations. (¶ 34.) In 2020, the Rowleys formed ONE. (¶ 22.) In early 2021, Plaintiffs accused the Rowleys of violating their non-compete obligations. (¶¶ 45–47.) In April 2021, the Rowleys initiated a lawsuit in the Delaware Court of Chancery, seeking a declaratory judgment that ONE’s business did not violate the Restrictive Covenant Agreement. (*Id.*) Plaintiffs filed an answer and counterclaims in response.<sup>3</sup> (¶ 47.)

### **B. The Settlement Agreement & Release**

On September 1, 2021, Plaintiffs and the Rowleys executed a Settlement Agreement (“Settlement”) resolving the parties’ claims in the Delaware litigation. (¶ 48; *see also* Doc. 8-4.) The Rowleys, arrivia, and Panda were all parties to the Settlement. (*See* Doc. 8-4.) ONE was included in the Settlement as an affiliate of the Rowleys but was not a signatory to the Settlement. (*Id.*) The Settlement included: a Mutual Release of Claims, Counterclaims, and Demands (“Release”); an Amended and Restated Restrictive Covenant Agreement; and a Confidentiality Agreement. (*Id.* §§ 2, 5, 24.) The Release provided the following:

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<sup>2</sup> This section draws from the allegations in the complaint, which are accepted as true for the purposes of this order.

<sup>3</sup> The Court takes judicial notice of the Rowleys’ complaint (Doc. 25-2) and arrivia and Panda’s answer and counterclaims (Doc. 25-3) filed in *Rowley v. Panda Holdco LLC*, C.A. No. 2021-0351-JRS (Ch. Del. 2021) in the Delaware Court of Chancery. *See Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (“[The Court] may take judicial notice of court filings and other matters of public record.”).

1 Upon the Effective Date [of September 1, 2021], each of the  
 2 Settling Parties, on behalf of themselves and each of their  
 3 affiliates . . . hereby unconditionally and irrevocably releases  
 4 and forever discharges each of the other Settling Parties and  
 5 their respective affiliates . . . from any and all . . . claims . . . ,  
 6 whether state or federal, . . . whether . . . known or unknown to  
 7 the parties as of the Effective Date, including but not limited to  
 8 those in connection with or arising from the dispute over the  
 9 Rowleys' non-compete obligations under the Restrictive  
 10 Covenant Agreement . . . and/ or subject matters outlined in the  
 11 Litigation; except no party is releasing any claims arising out  
 12 of the performance or non-performance of the obligations set  
 13 forth in this Settlement Agreement (including claims to enforce  
 14 any provisions of this Settlement Agreement) and any claims  
 15 expressly preserved herein.

16 Each Settling Party acknowledges and understands that there  
 17 is a risk that subsequent to the Effective Date of this Settlement  
 18 Agreement, each Settling Party may discover, incur or suffer  
 19 released claims that were unknown or unanticipated at the time  
 20 of the Effective Date of this Settlement Agreement, and which,  
 21 if known on the Effective Date . . . , might have materially  
 22 affected each Settling Party's decision to enter into and execute  
 23 this Settlement Agreement. Each Settling Party . . . is assuming  
 24 the risk of such unknown released claims and agrees that this  
 25 Agreement applies thereto.

26 Without in any way limiting any other provisions of this  
 27 Settlement Agreement, each Settling Party hereby covenants  
 28 not to sue or to assert, prosecute, or maintain, directly or  
 indirectly, in any form, any claims released by it pursuant to  
 the releases included herein.

18 (*Id.* § 2.) The Settlement also contained a Governing Law provision, stating that claims  
 19 “arising out of or relating to this Settlement Agreement” would be brought in the Court of  
 20 Chancery of the State of Delaware. (*Id.* § 21.) The parties further agreed “not to bring any  
 21 action or proceeding arising out of or relating to this Settlement Agreement or any of the  
 22 transactions contemplated by this Settlement Agreement in any other court.” (*Id.*)

### 23 **C. The Instant Lawsuit**

24 In June 2023, Plaintiffs brought this action, asserting the following counts:  
 25 (I) violation of the DTSA; (II) violation of the AUTSA; (III) breach of contract (non-  
 26 solicitation); (IV) breach of contract (confidentiality); and (V) unjust enrichment. Counts  
 27 I, II, and V—misappropriation of trade secrets and unjust enrichment—are alleged against  
 28 both the Rowleys and ONE. Counts III and IV—breach of contract—are alleged only

1 against the Rowleys. (Doc. 8.)

2 Plaintiffs allege the following facts in their complaint: In the months following the  
3 Settlement, the Rowleys stole Plaintiffs' employees and used Plaintiffs' trade secret  
4 information to build ONE, which now directly competes with arrivia. (Doc. 8 ¶¶ 110–29.)  
5 In describing the “Rowleys’ wrongful procurement” of confidential and trade secret  
6 information, Plaintiffs allege:

7           Knowing they were leaving arrivia and scheming to create a  
8 competitive travel and technology company, the Rowleys took  
arrivia’s trade secrets and confidential information. . . .

9           First, on February 13, 2020—after she resigned her officer  
10 position at arrivia and reaffirmed her confidentiality  
obligations, but shortly before her arrivia email account was  
11 disabled—Mrs. Rowley sent herself approximately 640  
documents in a zip folder . . . many of which contained  
12 arrivia’s confidential and trade secret information. . . . Mrs.  
Rowley [also] retained her entire arrivia Outlook email  
13 collection on the laptop she kept, ensuring herself ready access  
to client, supplier, and employee contact information, in  
14 addition to an abundance of other trade secret information. . . .

15           Second, in mid-2020, after he resigned from his officer  
position within arrivia, Mr. Rowley solicited and received  
16 several communications to his personal email address  
containing trade secrets and confidential information.

17 (¶¶ 68, 69, 73, 75.) Then, in describing ONE’s “improper theft” of arrivia’s trade secret  
18 information, Plaintiffs allege:

19           In 2021, former arrivia employees emailed several of arrivia’s  
20 highly confidential documents either directly to their [ONE  
company] email addresses or to their personal email addresses  
before forwarding them to ONE. For instance, arrivia’s now-  
21 former Executive Director . . . sent an email to his ONE email  
address right before he left his arrivia employment on  
22 February 1, 2021 to work for ONE.

23 (¶¶ 78–79.) Plaintiffs also allege that Mr. Rowley sent emails to arrivia employees in  
24 February of 2021, “encourag[ing] arrivia employees to violate their own confidentiality  
25 obligations and send arrivia’s protected competitive information to ONE.” (¶¶ 81–82.)  
26 Plaintiffs further assert that Defendants continue to possess and refuse to return arrivia’s  
27 trade secrets and that, with such trade secrets and confidential information in hand, the  
28 Rowleys have launched ONE as a competitor to arrivia. (¶¶ 85–99.)

For Plaintiffs’ misappropriation of trade secrets claims under the DTSA and AUTSA, respectively, Plaintiffs allege that Defendants improperly acquired, continue to possess, and fail to return Plaintiffs’ trade secrets and confidential information. (¶¶ 135–37, 153–55.) Further, Plaintiffs allege that Defendants have used and/or disclosed such trade secrets and confidential information, thereby violating the DTSA and AUTSA. (¶¶ 139–40, 145, 157–58, 163.) For Plaintiffs’ breach of contract claims, Plaintiffs allege the Rowleys have breached the non-solicitation covenant of their 2018 Restrictive Covenant with Panda, which was reaffirmed by the September 1, 2021 Settlement. (¶¶ 166–81.) Plaintiffs also allege the Rowleys have breached the confidentiality covenant of the 2018 Restrictive Covenant with Panda, also reaffirmed by the Settlement. (¶¶ 182–92.) And finally, for their unjust enrichment claim, Plaintiffs allege “Defendants are in possession of and have used arrivia’s valuable confidential information and trade secrets to launch ONE as a competitive business and unfairly compete with Plaintiffs.” (¶¶ 193–98.)

Plaintiffs assert that their claims are timely because a tolling period must be added to the original claim accrual date. (¶ 127.) Though Plaintiffs do not expressly acknowledge what that claim accrual date is, Plaintiffs state:

In order to allow for the potential return of arrivia’s trade secrets and a business resolution to this matter, the parties entered into a tolling agreement, which was in place from November 22, 2022 to April 10, 2023. After business discussions broke down, the Rowleys and ONE terminated the tolling agreement. arrivia and Panda’s claims are timely when the tolling period is added to the original claim accrual date.

(*Id.*)

## **II. DISCUSSION**

### **A. Motion to Dismiss**

Defendants raise two bases for dismissal. First, Defendants argue Plaintiffs’ misappropriation of trade secrets and unjust enrichment claims must be dismissed pursuant to Rule 12(b)(6) because Plaintiffs released these claims in their 2021 Settlement. Second, Plaintiffs’ complaint must be dismissed pursuant to Rule 12(b)(3) because the parties

1 agreed in their Settlement not to bring any action arising out of or relating to the Settlement  
 2 in any court other than the Court of Chancery of the State of Delaware and therefore  
 3 Arizona is the wrong forum. The Court addresses each basis for dismissal in turn.

4 1. Rule 12(b)(6)

5 Rule 12(b)(6) permits the Court to dismiss a complaint for “failure to state a claim  
 6 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal of a complaint, or  
 7 any claim within it, is appropriate under Rule 12(b)(6) where there is either a “lack of a  
 8 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal  
 9 claim.” *Balistreri v. Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1990). To survive  
 10 a 12(b)(6) motion to dismiss, a claim must be “plausible on its face.” *Ashcroft v. Iqbal*, 556  
 11 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual  
 12 content that allows the court to draw the reasonable inference that the defendant is liable  
 13 for the misconduct alleged.” *Id.* In deciding a Rule 12(b)(6) motion, the Court “generally  
 14 consider[s] only allegations contained in the pleadings, exhibits attached to the complaint,  
 15 and matters properly subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763  
 16 (9th Cir. 2007). The Court accepts all factual allegations in the complaint as true and  
 17 construes the pleadings in the light most favorable to the nonmoving party. *See Outdoor*  
 18 *Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).

19 **a. Misappropriation of Trade Secrets**

20 Defendants argue that because the Release in the Settlement bars any and all claims  
 21 known or unknown as of September 1, 2021, and because Plaintiffs’ misappropriation of  
 22 trade secrets claims accrued prior to September 1, 2021, Plaintiffs’ claims are barred.  
 23 (Doc. 24 at 8–13.) Defendants contend that under the DTSA and AUTSA, a claim for the  
 24 misappropriation of trade secrets arises only once: when the initial misappropriation  
 25 occurs. (*Id.*) Any subsequent use or disclosure of such trade secrets is not a distinct and  
 26 separate claim for misappropriation of trade secrets; rather, each subsequent use or  
 27 disclosure merely “augments” the initial claim. (*Id.*) Defendants argue that despite alleging  
 28 Defendants’ “continued use” of trade secrets *after* the Release, Plaintiffs’ claims under the

1 DTSA and AUTSA arose *prior* to the Release because that is when the alleged initial  
2 misappropriation occurred. Therefore, Plaintiffs’ DTSA and AUTSA claims are barred.  
3 (*Id.*)

4 Plaintiffs do not dispute that their DTSA and AUTSA claims accrued prior to the  
5 Release. (Doc. 29 at 10.) Instead, Plaintiffs argue that accrual date has “no bearing on  
6 whether . . . a continuing violation is actionable.” (*Id.*) Plaintiffs note that both the DTSA  
7 and AUTSA define “misappropriation” as the initial acquisition of a trade secret as well as  
8 the disclosure or use of a trade secret. (Doc. 29 at 7.) Plaintiffs contend that their claims  
9 are based on the latter definition—that they seek to recover for Defendants’ continued  
10 possession and use of arrivia’s trade secrets. (Doc. 29 at 6–11.) Plaintiffs argue this type  
11 of misappropriation occurred after the Settlement and therefore the Plaintiffs did not  
12 release such claims. The Court is not persuaded.

13 Arizona has adopted the Uniform Trade Secrets Act (“UTSA”), and the DTSA is  
14 largely modeled on it. 1990 Ariz. Sess. Laws. ch. 37; *Deerpont Grp., Inc. v. Agrigenix,*  
15 *LLC*, 345 F. Supp. 3d 1207, 1227 (E.D. Cal. 2018). Both the AUTSA and DTSA define  
16 “misappropriation” as either (1) “the acquisition of a trade secret of another by a person  
17 who knows or has reason to know that the trade secret was acquired by improper means”  
18 or (2) “the disclosure or use of a trade secret of another without express or implied consent  
19 by a person.” A.R.S. § 44-401(2); 18 U.S.C. § 1839(5). Both statutes have a three-year  
20 statute of limitations, accruing on the date the misappropriation is discovered or, by the  
21 exercise of reasonable diligence, should have been discovered. A.R.S. § 44-406; 18 U.S.C.  
22 § 1836(d). Furthermore, both the AUTSA and DTSA state that “[f]or the purposes of [the  
23 statute of limitations], a continuing misappropriation constitutes a single claim.” A.R.S.  
24 § 44-406; 18 U.S.C. § 1836(d).

25 Contrary to Plaintiffs’ argument, although the initial acquisition of trade secrets and  
26 the subsequent continued use of those same trade secrets may be multiple  
27 “misappropriations,” they constitute a single claim. As the California Supreme Court  
28 explained in *Cadence Design Sys., Inc. v. Avant! Corp.*, 57 P.3d 647, 652 (Cal. 2002):



1           A *misappropriation* within the meaning of the UTSA occurs  
 2           not only at the time of the initial acquisition of the trade secret  
 3           by wrongful means, but also with each misuse or wrongful  
 4           disclosure of the secret. But a *claim* for misappropriation of a  
 5           trade secret arises for a given plaintiff against a given  
 6           defendant only once, at the time of the initial  
 7           misappropriation . . . . Each new misuse or wrongful  
 8           disclosure is viewed as augmenting a single claim of  
 9           continuing misappropriation rather than giving rise to a  
 10          separate claim. . . .

11          If “continuing misappropriation” is viewed as a single claim  
 12          for statute of limitations purposes [only], then it is difficult to  
 13          fathom how it could be treated as more than one claim for  
 14          purposes of litigation generally. For example, a plaintiff could  
 15          not legitimately plead separate claims of misappropriation for  
 16          each misuse of a trade secret, for to do so would impermissibly  
 17          evade the statute of limitations.

18          57 P.3d at 651–52. *Cadence* further notes that the drafters of the UTSA “explicitly  
 19          . . . rejected the contrary view that misappropriation gives rise to multiple claims each time  
 20          the trade secret is misused or improperly disclosed.” *Id.* at 651.

21          The Court agrees with the reasoning in *Cadence* that an initial misappropriation of  
 22          trade secrets and a subsequent continuing misappropriation constitute a single claim. *See*  
 23          *also Deerpoint*, 345 F. Supp. 3d at 1228 (“Based on *Cadence* . . . , for the purposes of  
 24          [UTSA], a separate future misappropriation claim against a single defendant and involving  
 25          the same previously misappropriated trade secret is a legal impossibility.”). The Court is  
 26          also persuaded by the fact that states that have adopted the UTSA “consistently apply a  
 27          single claim theory to misappropriation of trade secrets.” *Id.* at 1227 (citing *Allied Erecting*  
 28          *& Dismantling Co. v. Genesis Equip & Mfg.*, 805 F.3d 701, 705 (6th Cir. 2015)); *see also*  
*Adcor Indus., Inc. v. Bevcorp, LLC*, 252 Fed. Appx. 55, 62 (6th Cir. Oct. 23, 2007); *Nw.*  
*Osteoscreening, Inc. v. Mountain View Hosp., LLC*, No. 4:13-cv-00414-BLW, 2014 WL  
 4955673, at \*6 (D. Idaho Oct. 2, 2014) (“Under [the UTSA], a continuing misappropriation  
 constitutes a single claim, with only the potential [for] damages encompassed by a  
 continuing misappropriation claim . . . expand[ing] with each illicit use or disclosure of the  
 trade secret.”) (internal citations and quotations omitted).

Plaintiffs contend that *Cadence* is inapplicable in this case because, unlike in



1 *Cadence*, the Settlement here contains a reaffirmation of Defendants’ confidentiality  
2 obligations. (Doc. 29 at 10.) Plaintiffs argue that the Court should instead rely on the  
3 reasoning in *Junction Sols., LLC v. MBS DEV, Inc.*, No. 06-C-163, 2007 WL 4233995 (N.  
4 D. Ill. Nov. 21, 2007). In *Junction*, the parties had—like in this case—agreed to release  
5 any and all claims known or unknown as of the settlement agreement’s effective date and  
6 further reaffirmed their confidentiality obligations. *Id.* at \*6. Later, the plaintiff filed suit,  
7 alleging misappropriation of trade secrets based on the defendants’ continued use of those  
8 secrets. *Id.* at 7. The district court found that the parties’ settlement agreement did not  
9 release plaintiff’s “continued use” claims against the defendants. *Id.* The court reasoned  
10 that based on the parties’ reaffirmation of their confidentiality obligations in their  
11 settlement agreement, “it [was] not clear that [the plaintiff] intended to release claims  
12 arising from defendants’ *future use* of trade secrets.” *Id.* Furthermore, the court reasoned  
13 that if the agreement had released such claims against the defendant, “the logical extension  
14 of this argument is that [the plaintiff] agreed to grant defendants complete immunity from  
15 all claims relating their use of [the plaintiff’s] trade secrets.” *Id.* Relying on *Junction*,  
16 Plaintiffs now contend that “to dismiss Plaintiffs’ suit entirely because some of  
17 Defendants’ initial theft occurred before the Effective Date would fully insulate all of  
18 Defendants’ misappropriation and continuing misuse.” (Doc. 29 at 9.)

19 The Court disagrees. As an initial matter, it is not clear how the reaffirmation of  
20 confidentiality obligations in the Settlement has a bearing on whether Plaintiffs’ trade  
21 secrets claims were released. Aside from pointing out the fact the settlement in *Cadence*  
22 lacked a confidentiality reaffirmation, Plaintiffs do not elaborate on why this distinction  
23 matters. (Doc. 29 at 10.) Furthermore, for the same reasons stated in *Deerpont*, the Court  
24 here finds that *Junction* is not persuasive. *See* 345 F. Supp. at 1225–26. First, no other court  
25 has adopted *Junction*’s above-mentioned reasoning. *Id.* Second, the Court disagrees that  
26 dismissing Plaintiffs’ misappropriation claims would fully insulate Defendants’ continuing  
27 misappropriation given that Plaintiffs can sue Defendants for breaching their contractual  
28 confidentiality obligations—which is what Plaintiffs have done in the instant case in

Count IV. *Id.* (“It is possible for plaintiffs . . . to obtain monetary damages and injunctive relief for the subsequent use or disclosure of a trade secret as part of a breach of contract/settlement claim.”); *see also* A.R.S. 44-407 (stating that the AUTSA does not displace or affect “contractual remedies, whether or not based on misappropriation of a trade secret”).

Plaintiffs also argue that in *Attia v. Google, LLC*, the Ninth Circuit held that the “continuing misappropriation” language of the DTSA is not relevant to whether the DTSA allows for claims of continued use, but rather is only relevant to when a claim accrues for statute of limitations purposes. 983 F.3d 420, 425 (9th Cir. 2020). But the issue in *Attia* is not the same issue as in this case. In *Attia*, the Ninth Circuit was examining whether a claim of misappropriation that accrued *prior to the enactment of the DTSA* foreclosed the possibility of a DTSA claim arising from the continued use of the trade secret *after DTSA’s enactment*. *Id.* at 425. So, the holding there concerned misappropriation before and after the statute’s enactment—not before and after a release of claims. *Attia* is inapposite.

In sum, the Court finds that under both the DTSA and AUTSA the continued improper use or disclosure of a trade secret after a defendant’s initial misappropriation of that trade secret constitutes a “single claim of misappropriation” accruing at the time of the initial misappropriation.<sup>4</sup> Turning to the pleadings, Plaintiffs’ claims under the DTSA and AUTSA are that Defendants, after improperly procuring trade secrets in 2020 and 2021, continued to possess and use Plaintiffs’ trade secrets after the effective date of the Settlement.<sup>5</sup> The Court finds that Defendants’ initial misappropriation before the Settlement and their continued misappropriation after the Settlement constitute a single

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<sup>4</sup> The scope of the Settlement, including the parties’ release of claims, is governed by Delaware law. (Doc. 8-4 § 21.) Delaware also follows the “single claim” approach regarding continuing misappropriations of trade secrets. *See Ocimum Biosolutions (India) Ltd. V. AstraZeneca UK Ltd.*, No. N15C-08-168 AML CCLD, 2019 WL 6726836, at \*16 (Del. Dec. 5, 2019) (“Under 6 Del. C. § 2006, a ‘continuing misappropriation constitutes a single claim’ that accrues when the misappropriation reasonably could be discovered. That ‘single claim’ rule means a plaintiff may not bring separate trade secret claims for each use of the same trade secret, and the single claim [accrues] when the misappropriation was or could have been discovered.”).

<sup>5</sup> Plaintiffs do not dispute that their claims for continuing misappropriation are premised on the allegation that Defendants improperly acquired those trade secrets in 2020 and 2021 *before* the Release. (Doc. 29 at 7; *see e.g.*, Doc. 8 ¶¶ 4–6 8–15, 68–99.)

1 claim. In turn, because these were claims known or unknown as of the effective date of the  
 2 Settlement, Plaintiffs released these claims. Accordingly, the Court grants Defendants’  
 3 Rule 12(b)(6) motion to dismiss Plaintiffs’ DTSA and AUTSA claims.

4 **b. Unjust Enrichment**

5 Plaintiffs plead in the alternative a claim for unjust enrichment. Specifically,  
 6 Plaintiffs allege,

7 Defendants are in possession of and have used arrivia’s  
 8 valuable confidential information and trade secrets to launch  
 9 ONE as a competitive business and unfairly compete with  
 10 Plaintiffs. Through the use of Plaintiffs’ valuable information,  
 11 Defendants have avoided significant costs and gained a head  
 start. Defendants have retained and continued to use arrivia’s  
 valuable confidential information at Plaintiffs’ expense to gain  
 a competitive advantage and unfairly compete with Plaintiffs.

12 (Doc. 8 ¶¶ 195–96.) Defendants make two arguments for why Plaintiffs’ unjust enrichment  
 13 claim should be dismissed: (1) Plaintiffs’ unjust enrichment claim based on Defendants’  
 14 alleged misappropriation of trade secrets is preempted by the AUTSA and (2) Plaintiffs  
 15 released this claim. (Doc. 24 at 10, 13; Doc. 35 at 8–9.) Plaintiffs respond that the AUTSA  
 16 does not preempt their claim because the statute “does not displace common-law claims  
 17 based on the alleged misappropriation of confidential information that is not a trade secret.”  
 18 Plaintiffs also argue that their unjust enrichment claim was not released, pointing to the  
 19 same arguments they made for why their misappropriation of trade secrets claims were not  
 20 released. (Doc. 29 at 12.)

21 The Court need not reach Defendants’ first argument because the Court finds that  
 22 Plaintiffs released their unjust enrichment claim. As discussed, Plaintiffs released all claims  
 23 “known or unknown to the parties as of the Effective Date, including but not limited to  
 24 those in connection with or arising from . . . the subject matters outlined in the [Delaware]  
 25 Litigation.” In that litigation, Plaintiffs claimed that the Rowleys breached their Restrictive  
 26 Covenant Agreement with Panda by using confidential information for their personal  
 27 benefit. (Doc. 25-3 at ¶¶ 96–107.) Plaintiffs alleged the Rowleys were using Plaintiffs’  
 28 confidential and proprietary information for their own benefit and to unfairly establish their

1 competing business venture, ONE. (Doc. 25-3 ¶¶ 64–70.) Plaintiffs’ unjust enrichment  
 2 claim in the instant action appears identical to Plaintiffs’ allegations and claims in the  
 3 Delaware litigation.

4 Moreover, as with their misappropriation of trade secrets claims, Plaintiffs’ claim  
 5 that Defendants are using and benefiting from Plaintiffs’ confidential information is  
 6 premised on the allegation that the Defendants improperly acquired that confidential  
 7 information *prior* to the Settlement. (See *e.g.*, Doc. 8 ¶¶ 68–79.) Yet Plaintiffs expressly  
 8 agreed in their Settlement that “there is a risk that subsequent to the Effective Date . . . ,  
 9 each Settling Party may discover, incur or suffer released claims that were unknown or  
 10 unanticipated at the time of the Effective Date” and that “each Settling Party is assuming  
 11 the risk of such unknown released claims.” Thus, even if Defendants’ subsequent use of  
 12 the confidential information was unanticipated at the time of the Settlement, the Plaintiffs  
 13 were clearly aware at the time of the Settlement of the facts giving rise to this claim.

14 Plaintiffs’ only argument concerning the release of this claim is that their “unjust  
 15 enrichment claim may proceed like their trade secret claims.” (Doc. 29 at 12.) However,  
 16 given the Court’s finding that Plaintiffs released their trade secret claims, Plaintiffs’  
 17 argument fails. Plaintiffs provide no other argument as to why their unjust enrichment  
 18 claim falls outside the scope of the Release. As such, the Court grants Defendants’  
 19 Rule 12(b)(6) motion to dismiss Plaintiffs’ unjust enrichment claim.

## 20 2. Forum-Selection Clause

21 The remaining two claims in Plaintiffs’ complaint are for breach of contract, and  
 22 these claims are brought only against the Rowleys. The Rowleys contend that pursuant to  
 23 the Settlement’s forum-selection clause, which requires that any claims arising out of the  
 24 Settlement be brought in the Delaware Court of Chancery, Plaintiffs’ breach of contract  
 25 claims are in the wrong forum and therefore should be dismissed under Rule 12(b)(3).  
 26 (Doc. 24 at 13–14.) Plaintiffs acknowledge that the forum-selection clause applies to their  
 27 breach of contract claims but argue that to avoid claim splitting between their breach of  
 28 contract claims and their misappropriation of trade secrets and unjust enrichment claims,

1 the Court should not enforce the forum-selection clause. (Doc. 29 at 14–15.) This argument  
2 necessarily fails because the breach of contract claims against the Rowleys are the only  
3 claims that remain, and so there is no risk of claim splitting.

4 Plaintiffs also argue that Rule 12(b)(3) is an improper mechanism for enforcing a  
5 forum-selection clause and that the appropriate way to enforce such a clause is either  
6 through a motion to transfer under 28 U.S.C. § 1404(a) or, for instances in which a forum-  
7 selection clause points to a non-federal forum, through the doctrine of *forum*  
8 *nonconveniens*. (Doc. 29 at 16–17.) They urge the Court to deny Defendants’ motion or,  
9 in the alternative, transfer the case to Delaware. (*Id.*)

10 Plaintiffs are correct that a forum-selection clause cannot be enforced by a motion  
11 to dismiss under Rule 12(b)(3). *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of*  
12 *Texas*, 571 U.S. 49, 55 (2013). However, the Court disagrees that transfer is appropriate  
13 here given that a transfer pursuant to § 1404(a) would send the case to federal court in  
14 Delaware, which is still the wrong forum. Plaintiffs even acknowledge that where a forum-  
15 selection clause points to a non-federal forum—as in this case—the doctrine of *forum non*  
16 *conveniens* is the appropriate mechanism of enforcing the clause.

17 The Court also disagrees that it should deny Defendants’ motion to dismiss merely  
18 for a technical deficiency. Rather, in the interest of judicial efficiency and given that  
19 Defendants’ motion is in substance a motion to dismiss for *forum non conveniens*, the Court  
20 will evaluate whether to dismiss the case based on those grounds. *See Mogannam v. First*  
21 *Fin. Merch. Servs.*, No. 15-CV-00827-TLN-CKD, 2016 WL 561813, at \*2 (E.D. Cal. Fed.  
22 12, 2016); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (noting that federal  
23 courts have inherent power to dismiss an action on grounds of *forum non conveniens*).  
24 Furthermore, Plaintiffs are not prejudiced by the Court construing Defendants’ motion this  
25 way given that the Plaintiffs themselves requested transfer to Delaware under § 1404(a),  
26 and the standard for granting transfer under § 1404 and dismissing a case on the grounds  
27 of *forum non conveniens* are the same. *Atl. Marine Const. Co.*, 571 U.S. at 61 (“[B]ecause  
28 both § 1404(a) and the *forum non conveniens* doctrine from which it derives entail the same

1 balancing-of-interests standard, courts should evaluate a forum-selection clause pointing  
2 to a nonfederal forum in the same way they evaluate a forum-selection clause pointing to  
3 a federal forum.”).

4 In evaluating whether to dismiss for *forum non conveniens*, a court will typically  
5 consider private and public interests. *Id.* at 62–63. If, however, the parties’ contract  
6 contains a valid forum-selection clause, a plaintiff’s choice of forum merits no weight,  
7 arguments about the parties’ private interests are not considered, and only public interests  
8 are considered. *Id.* at 63–64. Because public interests “will rarely defeat a [*forum non*  
9 *conveniens*] motion, the practical result is that forum-selection clauses should control  
10 except in unusual cases.” *Id.* at 64. A forum-selection clause should be enforced unless the  
11 resisting party makes a showing that enforcement of the clause is “unreasonable under the  
12 circumstances.” *M/S Bremen v. Zapata Off-Short Co.*, 407 U.S. 1, 10 (1972) (internal  
13 quotation omitted).

14 The Court finds the forum-selection clause here is enforceable. The only argument  
15 Plaintiffs raise as to why enforcing the clause may be unreasonable is that doing so would  
16 require Plaintiffs to split their misappropriation of trade secrets and unjust enrichment  
17 claims and their breach of contract claims across forums, forcing Plaintiffs to proceed  
18 piecemeal. (Doc. 29 at 14–15.) Again, given the Court’s dismissal of the former claims,  
19 Plaintiffs’ argument necessarily fails. Plaintiffs make no other arguments for why  
20 enforcing the clause is unreasonable under the circumstances. The Court finds that  
21 Plaintiffs have not “carried their heavy burden of showing the sort of exceptional  
22 circumstances that would justify disregarding a forum-selection clause.” *See Yei A Sun v.*  
23 *Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1087–88 (9th Cir. 2018).

24 The Court next evaluates whether public interest considerations weigh against  
25 enforcing the forum-selection clause. They do not. “Public-interest factors may include the  
26 administrative difficulties flowing from court congestion; the local interest in having  
27 localized controversies decided at home; [and] the interest in having the trial of a diversity  
28 case in a forum that is at home with the law.” *Atl. Marine Const. Co.*, 571 U.S. at 62 n.6



(internal quotation omitted). There is no evidence that any of these factors justifies refusing to enforce the forum-selection clause. Nor do Plaintiffs argue that public interest factors weigh against enforcement of the clause. Thus, given that the forum-selection clause is valid and public interest factors do not weigh against its enforcement, the Court dismisses the remainder of Plaintiffs' complaint without prejudice under *forum non conveniens*.

### **B. Motion for Sanctions**

In addition to their motion to dismiss, Defendants also move for sanctions against Plaintiffs and their counsel for "bringing frivolous claims and initiating this action in bad faith." (Doc. 34.) For the following reasons, the Court denies Defendants' motion.

Under Federal Rule of Civil Procedure 11, courts may impose sanctions "when a filing is frivolous, legally unreasonable or without factual foundation, or is brought for an improper purpose." *Estate of Blue v. Cnty. of Los Angeles*, 120 F.3d 982, 985 (9th Cir. 1997); Fed. R. Civ. P. 11(b). In those cases, a court may impose sanctions on one or more attorneys, law firms, or parties. *Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 291 (9th Cir. 1995); Fed. R. Civ. P. 11(c). However, courts "must exercise extreme caution" when imposing Rule 11 sanctions. *Larez v. Holcomb*, 16 F.3d 1513, 1522 (9th Cir. 1994). A complaint is frivolous if it is both legally and factually baseless and is made without reasonable and competent inquiry. *Townsend v. Holman*, 929 F.2d 1358, 1362 (9th Cir. 1991). To constitute a frivolous legal position for Rule 11 sanctions, "it must be clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify, or reverse the law as it stands." *Strom v. United States*, 641 F.3d 1051, 1059 (9th Cir. 2011) (quoting *Simon DeBartolo Grp., L.P. v. Richard E. Jacobs Grp., Inc.*, 186 F.3d 157, 167 (2d Cir. 1999)). A court "should *not* impose Rule 11 sanctions in response to a pleading that makes a 'good faith argument for the extension, modification, or reversal of existing law, and that is not interposed for any improper purpose.'" *Id.* (emphasis added).

Separate from Rule 11, a court, under its inherent powers, may impose sanctions for bad faith. Before doing so, however, a "court must make an explicit finding that counsel's

1 conduct constituted or was tantamount to bad faith.” *Primus Auto. Fin. Servs., Inc. v.*  
 2 *Batarse*, 115 F.3d 644, 648 (9th Cir. 1997) (internal quotations omitted). “A finding of bad  
 3 faith is warranted where an attorney knowingly or recklessly raises a frivolous argument[]  
 4 or argues a meritorious claim for the purposes of harassing an opponent.” *Id.* at 649  
 5 (internal quotations omitted). As with ordering Rule 11 sanctions, imposing sanctions for  
 6 bad faith is “an extraordinary remedy, one to be exercised with extreme caution.” *In re*  
 7 *Keegan Mgmt Co, Sec. Litig.*, 78 F.3d 431, 436–37 (9th Cir. 1996).

8 Here, Defendants assert that Plaintiffs’ claims are frivolous because they were either  
 9 released or brought in the wrong forum. (Doc. 34 at 9.) Defendants argue that “Plaintiffs  
 10 ran afoul their Rule 11 obligations when they brought [trade secret] claims before this  
 11 Court that they knew were already released” and that even a “cursory review of the basic  
 12 statutory provisions of the AUTSA and DTSA” would have revealed to Plaintiffs that their  
 13 claims were released. (*Id.* at 14.) Not so. Although the Court finds that Plaintiffs released  
 14 their misappropriation of trade secrets and unjust enrichment claims, the law in this area is  
 15 not clearly settled. This is evidenced by the fact that both Plaintiffs and Defendants directed  
 16 the Court’s attention to persuasive—but not binding—authority that supported their  
 17 respective positions. (*See e.g.*, Doc. 24 at 8–9, Doc. 29 at 8–9.) Just as Defendants urged  
 18 the Court to adopt the reasoning used in *Cadence*, Plaintiffs made a good faith argument  
 19 for why the Court should instead adopt the reasoning in *Junction*. As it stands, there is no  
 20 Ninth Circuit precedent that speaks to this issue of released misappropriation of trade  
 21 secrets claims—that is whether a party that releases past claims of misappropriated trade  
 22 secrets also releases claims for the continued misappropriation of those secrets. Thus, it  
 23 was not clear under existing precedent that Plaintiffs’ claims of misappropriated trade  
 24 secrets and unjust enrichment stood no chance of success, and so the Court does not find  
 25 these claims frivolous.

26 Defendants also assert that “Plaintiffs’ claims for breach of the Settlement  
 27 Agreement were frivolously brought in this Court” given the Settlement’s forum-selection  
 28 clause. (Doc. 34 at 15–16.) The Court disagrees. Plaintiffs’ forum selection was not, as

1 Defendants argue, “objectively baseless.” Plaintiffs provided a reasonable and legally  
2 sound argument, though ultimately unsuccessful, for bringing their breach of contract  
3 claims in this Court rather than Delaware. Although Plaintiffs acknowledged that the  
4 forum-selection clause covered their breach of contract claims against the Rowleys,  
5 Plaintiffs asserted in their complaint that the forum-selection clause did not “govern ONE  
6 or the trade secret claims to which the contract issues are closely connected and which  
7 involve similar conduct.” (Doc. 8 § 27n.1.) It was reasonable for Plaintiffs to institute their  
8 action in Arizona to avoid claim splitting and proceeding piecemeal in their litigation.

9 Finally, Defendants argue that Plaintiffs brought this suit in bad faith—that  
10 Plaintiffs knew their trade secrets claims were barred, made false representations of fact to  
11 “manipulate their way” into this Court, and knowingly chose to bring their suit in an  
12 improper forum. Again, the Court disagrees. As discussed, the Court does not find  
13 Plaintiffs’ claims frivolous. Nor is there any evidence that Plaintiffs brought their claims  
14 to harass Defendants. Furthermore, though Defendants accuse Plaintiffs of making “false  
15 representations,” Defendants do not point to any specific evidence of this, and the Court,  
16 upon its own review of the record, finds none.

17 In sum, there is no evidence that Plaintiffs filed their complaint frivolously or for an  
18 improper purpose. The Court concludes that Plaintiffs and their counsel neither violated  
19 Rule 11 nor engaged in bad faith conduct. Accordingly, the Court denies Defendants’  
20 motion for sanctions.

### 21 C. Attorneys’ Fees

22 Lastly, Defendants seek an award of their reasonable attorneys’ fees and costs  
23 pursuant to A.R.S. §§ 12-341.01, 12-341, 12-349, 44-404 and 18 U.S.C. § 1836(b)(3)(D),  
24 and Plaintiffs seek an award pursuant to Federal Rule of Civil Procedure 11(C)(2). (*See*  
25 Doc. 24 at 14, Doc. 30 at 17.) The parties’ requests are denied without prejudice because  
26 neither complies with LRCiv 54.2.

27 **IT IS ORDERED** that Defendants’ Motion to Dismiss (Doc. 24) is **GRANTED** as  
28 follows:

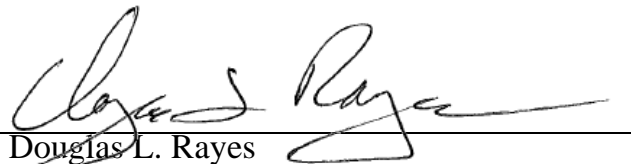
- Plaintiffs' DTSA claim (Count I), AUTSA claim (Count II), and Unjust Enrichment claim (Count V) are dismissed pursuant to Rule 12(b)(6);
- The Court construes Defendants' motion to dismiss the remainder of Plaintiffs' complaint pursuant to Rule 12(b)(3) as a motion to dismiss under *forum non conveniens* and dismisses the remainder of Plaintiffs' complaint without prejudice to the remaining claims being refiled in the Delaware Court of Chancery.

**IT IS FURTHER ORDERED** that Defendants' Motion for Sanctions (Doc. 34) is **DENIED**.

**IT IS FURTHER ORDERED** that the parties' respective requests for attorneys' fees (Docs. 24, 34) are denied without prejudice to the parties moving for those fees in a manner that complies with LRCiv 54.2, if appropriate in light of this disposition.

**IT IS FURTHER ORDERED** that the Clerk of the Court is directed to terminate the case.

Dated this 8th day of November, 2023.

  
Douglas L. Rayes  
United States District Judge